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No. 84-556

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN SECURITY COUNCIL, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in concluding that petitioner's complaint against CBS, Inc. failed to make a prima facie showing of a fairness doctrine violation because the complaint did not demonstrate that CBS had failed to provide a reasonable opportunity for contrasting viewpoints on the issue of national defense.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 5a-6a) is reported at 733 F.2d 966 (Table). The decision of the Federal Communications Commission denying petitioner's fairness doctrine complaint against CBS, Inc. (Pet. App. 7a-25a) is reported at 94 F.C.C. 2d 521.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1984. A petition for rehearing was denied on June 15, 1984 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed, after an extension of time, on October 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

For five consecutive nights in June 1981, the CBS Television Network (CBS) televised a five-part series in prime time entitled *The Defense of the United States*.[1] Petitioner thereafter requested CBS to broadcast programming to provide more "pro-defense" points of view and to correct alleged factual errors in the series (Pet. App. 76a). CBS denied the request because, in its judgment, the series "included a variety of viewpoints regarding national defense issues" and "the broadcast was fair and accurate" (Pet. App. 77a).

Petitioner then filed a fairness doctrine[2] complaint with the Federal Communications Commission in which it alleged, inter alia, that because CBS had offered its five-part series "as a *definitive* study" of the country's national defense, the series, in itself, should have had a balance among contrasting viewpoints on the issue whether the nation needs less or more national defense, without regard to CBS's overall programming on this issue (Pet. App. 42a, 58a-59a (emphasis in original)).[3] Petitioner sought an FCC

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[1]The series was rebroadcast during non-prime time hours in August 1981.

[2]The fairness doctrine requires that each broadcaster: (1) devote a reasonable percentage of its broadcast time to coverage of controversial issues of public importance and (2) provide a reasonable opportunity for the presentation of conflicting views on such issues during its overall programming. This case was decided on the basis of a broadcaster's fairness obligations at the time of the broadcasts that gave rise to petitioner's complaint. On May 14, 1984, the Commission issued a notice of inquiry looking toward a general reassessment of the fairness doctrine. See Notice of Inquiry in Docket 84-282, 49 Fed. Reg. 20317. The proceeding has not yet been completed.

[3]In a footnote in its complaint, petitioner added that it "is aware of no such 'other programming' that could be offered by CBS to 'balance' " the viewpoint that petitioner said was broadcast in the series, namely, that the nation is spending too much for national defense (Pet. App. 42a n.7).

order compelling CBS "to provide at least two hours of prime time programming" in which the "factual errors" in the five-part series would be corrected and the opposing viewpoint that the United States needs to spend more for national defense would be broadcast (Pet. App. 64a).

The Commission's Broadcast Bureau (Pet. App. 18a-25a) and later the Commission (Pet. App. 7a-17a) denied the complaint because, inter alia, petitioner did not show that CBS failed to provide a "reasonable opportunity" for the presentation of the viewpoint favoring more spending for defense (Pet. App. 10a). Although it reiterated that the fairness doctrine requires only that contrasting viewpoints be broadcast in the licensee's overall programming, the Commission pointed out that the viewpoint that petitioner wanted CBS to broadcast had been presented during the series.[4] With regard to CBS' overall programming, the Commission understood petitioner's contention to be that "whatever programming CBS has presented on the 'more defense spending' side of the issue [is] insufficient for purposes of a balanced presentation" (Pet. App. 15a; see also Pet. App. 42a n.7). The Commission held that this did not satisfy the complainant's burden under the fairness doctrine to offer "detailed and specific evidence" of an "imbalance in the licensee's overall programming" (Pet. App. 15a (citations omitted)). In light of petitioner's failure to establish a prima facie case of a fairness doctrine violation, the Commission found that no inquiry of CBS was warranted and upheld the Bureau's denial of the complaint (Pet. App. 16a n.5, 17a).

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[4]Specifically, transcripts of the series, which were included as an exhibit to petitioner's complaint (see Pet. App. 135a), revealed statements of the Secretary of Defense, the Chairman of the Senate Armed Services Committee, and a Navy Admiral in favor of increased defense spending, as well as a report by a CBS News correspondent who advocated more spending for military training, salaries for skilled personnel, and weapons parts (Pet. App. 23a n.4).

The court of appeals affirmed without opinion (Pet. App. 5a-6a).

ARGUMENT

In holding that petitioner's complaint did not set forth a prima facie fairness doctrine claim, the Federal Communications Commission applied well-established general fairness doctrine principles. Petitioner contests the application of those principles to the facts of this case. But the application of these principles to the particular facts of this case was unanimously approved by the Commission and the court of appeals and clearly does not warrant this court review.

The Commission outlined the elements of the fairness doctrine in the *Fairness Report*, 48 F.C.C. 2d 1 (1974), reconsideration denied, 58 F.C.C. 2d 691 (1976), aff'd in relevant part *sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978). In particular, before the Commission will require a broadcaster to defend its programming judgments, a complaint must set out a prima facie case of a violation, including:

> (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) *the basis for the claim that the station has presented only one side of the question*; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

48 F.C.C. 2d at 19, quoting *Fairness Doctrine Primer*, 40 F.C.C. 598, 600 (1964) (emphasis added). These criteria have been consistently approved by the courts.[5]

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[5]See, *e.g.*, *American Security Council Education Foundation* v. *FCC*, 607 F.2d 438, 446 (D.C. Cir. 1979) (en banc), cert. denied, 444 U.S. 1013 (1980); *Kennedy for President Committee* v. *FCC*, 636 F.2d 432, 453 (D.C. Cir. 1980); *Democratic National Committee* v. *FCC*, 717 F.2d 1471, 1475 (D.C. Cir. 1983).

In this case, an examination of the transcripts of *The Defense of the United States* revealed, and petitioner has never disputed, that the viewpoint favoring more spending for national defense was broadcast at various times during the program series. See page 3 & note 4, *supra*. Petitioner thus could not allege that CBS failed to broadcast any programming in which the viewpoint favoring more spending for national defense was presented. Rather, petitioner appeared to argue that, "whatever programming CBS had presented on the 'more defense spending' side of the issue [is] insufficient for purposes of a balanced presentation" (Pet. App. 15a). However, the Commission concluded that this claim lacked specific factual support and thus was insufficient to demonstrate an "imbalance in the licensee's overall programming" (Pet. App. 14a-16a).[6] The court of appeals found no reason to disturb this conclusion. Its judgment with respect to this issue, which is little more than a pleading issue, does not warrant further review.

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[6]Petitioner suggests (Pet. 12-13) that "the fairness doctrine • • • [provides a remedy] [f]or broadcasts that are biased, slanted, or grossly misleading • • •." However, the fairness doctrine was not designed to correct alleged instances of news distortion and falsification by broadcasters. The doctrine simply requires that broadcasters afford coverage to controversial public issues and that they provide a reasonable opportunity for the presentation of contrasting viewpoints on those issues. See generally *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 377-378 (1969). The Commission has a separate policy of investigating charges of news distortion where the allegations are properly supported by "substantial extrinsic evidence or documents that on their face reflect deliberate distortion." *Fairness Report*, 48 F.C.C. 2d at 21 (citation mitted). See *Yellow Freight System, Inc.* v. *FCC*, 656 F.2d 600 (10th Cir. 1981); *National Organization for Women* v. *FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977). Petitioner does not challenge this standard or claim that it met the extrinsic evidence test. To the contrary, petitioner specifically disclaimed any allegation that "CBS set out to consciously slant this program [series]" (Pet. App. 61a; see also Pet. App. 59a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

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